

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

To Be Argued By
NICHOLAS A. ROBINSON

77-6020
APPEAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROBERT WILLIAM ALTIMUS,

Plaintiff-Appellant,

-against-

MANHOD FOUNDATION, INC., ROBERT ROBINSON,
SOCIETY OF ST. VICENT de PAUL, JOSEPH M.
FITZPATRICK, VIRGINIA RUSSELL, H.F.J.
CONSTRUCTION COMPANY, HAROLD M. STEWART,
ELLIOT RICHARDSON, Personally and in his
capacity as Attorney-General of the
United States, MAURICE H. SIGLER,
Personally and in his capacity as Chairman
of the United States Board of Parole,
GERALD E. MURCH, WILLIAM T. WOODWARD, JR.,
GEORGE J. REED, WILLIAM E. AMOS, PAULA A.
TENNANT, CURTIS C. CRAWFORD, Personally
and in their capacities as members of the
United States Board of Parole, NORMAN A.
CARLSON, Personally, and in his capacity
as the Director of the United States Bureau
of Prisons, RALPH L. AARON, Personally and
in his capacity as the Warden of the Federal
Correctional Institution at Sandstone,
Minnesota,

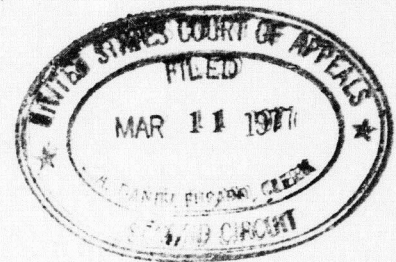
Defendants-Appellees.

Appeal From The U.S. District Court For The
Southern District of New York

BRIEF FOR APPELLANT AND APPENDIX

Dated: New York, New York
March 10, 1977

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROBERT WILLIAM ALTIMUS,

Plaintiff-Appellant,

-against-

MANHOOD FOUNDATION, INC., et al. ["Private Defendants"]
and Elliot Richardson, et al. ["Federal Defendants"],

Defendants-Appellees.

(Docket No. 77-6020)

BRIEF FOR APPELLANT

PRELIMINARY STATEMENT

This is an appeal from a judgment of dismissal set forth in a Memorandum and Order of the District Court, S.D.N.Y., dated December 21, 1976 and filed December 28, 1976 (A1-A18), which also denied reargument of that Court's Memorandum and Order dated October 7, 1974 and filed October 8, 1974 (A19-A29).^{*} Plaintiff-Appellant's claims arose in the

* References to portions of the record reproduced in Appellant's Appendix attached to this brief are cited as "A1-A18" meaning Appellant's Appendix at pages one through eighteen. The use of "Ex." means the Exhibit attached to a cited document on appeal.

context of parole-release proceedings while he was a prisoner at the Federal Correctional Institution at Sandstone, Minnesota.

STATEMENT OF ISSUES PRESENTED
FOR REVIEW

1. Where two U.S. Board of Parole members are found to act in violation of certain Constitutional rights of a prisoner, is an award of damages to the prisoner barred by the Doctrine of Executive Immunity?
2. Did the Administrative Procedure Act, 5 USC §555(e), ("A.P.A.") apply to the U.S. Board of Parole, and are Board members liable for injury caused because they violated the A.P.A.?
3. Did the District Court err in failing to rule on the prisoner's claims that his rights under the A.P.A. and other of his Constitutional rights were denied and in denying reargument?
4. Did the District Court err in dismissing the prisoner's claims against both the Federal Defendants and the Private Defendants?

STATEMENT OF THE CASE

All material facts in this appeal are uncontested. They are contained primarily in two affidavits and the exhibits attached thereto. The first affidavit sets forth facts in the personal knowledge of Plaintiff-Appellant Robert William Altimus ("Mr. Altimus"), and verifies the Amended Complaint. AFFIDAVIT of Robert William Altimus sworn to February 18, 1974, Document 26 on Appeal ["AFF. I"]. The second affidavit sets forth facts present in Mr. Altimus' prison file after the file was revealed to him for the first time in the course of this litigation. AFFIDAVIT of Nicholas A. Robinson, sworn to April 28, 1976, Document 34 on appeal ["AFF. II"]. The few affidavits of counsel for the defendants who were the federal prison, parole and Justice Department officials involved, Messrs. Richardson, Sigler, Murch, Woodward, Jr., Reed, Amos, Crawford, Carlson, Aaron and Ms. Tennant ["Federal Defendants"], and the few personal affidavits of Virginia Russell, Joseph M. Fitzpatrick, Robert Robinson for himself and for the Manhood Foundation, and their counsel, supplement and in no way contradict the material facts necessary to this appeal.

A. THE FACTS OF RECORD ESTABLISH
THAT MR. ALTIMUS UNLAWFULLY AND
TORTIOUSLY WAS DENIED PAROLE
RELEASE.

Mr. Altimus commenced this action on February 7, 1973, while incarcerated in The Federal Correctional Institution in Sandstone, Minnesota ("Sandstone") following his plea of guilty in the U.S. District Court for Florida for having possession of an automobile there stolen from Nebraska ("Dwyer Act", Interstate theft of an automobile, 18 USC §2311-3). While in Sandstone, Mr. Altimus was a model prisoner, housed in an honor unit and active with the Junior Chamber of Commerce.

In March of 1972 Mr. Altimus wrote to the Society of St. Vincent dePaul in New York ("Society") seeking its assistance in formulating a plan for his employment, housing and supervision to propose to the U.S. Board of Parole ("Parole Board") with an application for release on parole. The Society referred him to the Manhood Foundation, whose head counselor Robert Robinson found a job at \$7.10/hour for Mr. Altimus with the H.F.J. Construction Company. Mr. Robinson agreed to act as his Parole Advisor. The Society agreed to help Mr. Altimus obtain suitable housing in New York.

The employer and advisor forms were thereafter sent to Sandstone and confirmed as accurate by Vern Erickson, Mr. Altimus' caseworker at Sandstone.

Mr. Altimus then filed his formal application for Parole Release, to appear before the Board of Parole's Examiner when Parole Hearings were held in August, 1972.

On or about August 10, 1972, Mr. Altimus was notified to appear before the Parole Board's Examiner, Arnold J. Vodvarka, on August 14, 1972. At his hearing, Mr. Altimus was denied an opportunity to (i) see his prison parole release application file, (ii) be told of and rebut any opposition to his parole release, (iii) be told about or answer any defects in his application for parole, (iv) present witnesses in support of his parole release or (v) be represented by counsel. All that Mr. Altimus was allowed to do was to make a brief statement about his work experience and civic activities at Sandstone.

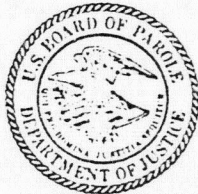
Mr. Altimus heard nothing more until he received a
"Notice of Action" dated September 18, 1972 (AFF. I, Ex. 3):

Parole Form II-7
(Rev. Jan. 1972)
(Combined with II-6)

UNITED STATES DEPARTMENT OF JUSTICE

United States Board of Parole

Washington, D.C. 20537



Notice of Action

Name ROBERT WILLIAM ALTIMUS

Register Number 18495-149

Institution Sandstone

In the case of the above-named, the Board (or its Youth Correction Division) in its offices in Washington, D.C. has carefully examined all the information at its disposal and the following action with regard to parole, parole status, or mandatory release status was ordered.

.....
..... CONTINUE TO EXPIRATION

KL

.....
United States Board of Parole:

Date Sept. 13, 1972

INMATE COPY

James R. Pae
.....
Parole/Youth Division Executive.

The Notice of Action "shocked" Mr. Altimus. (AFF, I, para. 26). He had every expectation that his Parole Plan and Application were satisfactory in all respects. He politely wrote the Parole Board and its Chairman asking for the reasons why parole was denied. He received bureaucratic double talk and stone-walling in reply: "No favorable action could be taken at this time" and no reasons could be given "since the decision of the Board constitutes the thinking of the majority of the members." (AFF. I, Exhibits 5 and 6).

Mr. Altimus knew that the Board of Parole had a standard form on which reasons could be given. (AFF. I, Ex. 7). He read Morrissey v. Brewer, 408 U.S. 471 (1972) and could not reconcile the Supreme Court's analysis of the purposes of parole with his own experience. He wrote Senators, including then Senator Mondale, the Rochester Junior Chamber of Commerce, the American Civil Liberties Union and others seeking help. To all the Parole Board refused to give reasons for denying him parole.

While still trying to discover the reasons for the denial of his first parole release application, he wrote the Rochester Junior Chamber of Commerce seeking its help in fashioning a new parole release plan in hopes of overcoming

whatever as yet unknown defects his first plan may have had. Mr. DuWayne E. Paul for the Rochester Jaycees then developed a new parole plan. The Board in January of 1973 told Mr. Paul: "On September 18, 1972, the Board voted to continue Mr. Altimus' case to expiration. Although we appreciate your efforts in his behalf, we have decided not to change that order." (AFF. II, Ex. N.) No reasons were ever given by the Board.

Completely frustrated, Mr. Altimus could only conclude that the Board had acted in an arbitrary and capricious manner which denied him his rights under the Constitution and the Administrative Procedure Act. Proceeding pro se, he drew legal papers stating his claims against the persons constituting the Board of Parole and the prison officials for denying him his constitutional rights. Mr. Altimus also proceeded against the Society and its employees Fitzpatrick and Russell, the Manhood Foundation and Robinson and H.F.J. Construction Company and its President Harold M. Stewart ("Private Defendants") since he believed that the Private Defendants must have assembled a deficient parole plan.

B. THE PROCEEDINGS BELOW DENIED
MR. ALTIMUS THE RELIEF TO
WHICH HE WAS ENTITLED.

The U.S. Marshall served his summons and pleadings on all defendants in February of 1973 and Chief Judge Edelstein granted Mr. Altimus' application to proceed in forma pauperis.

At the request of attorneys for the defendants, the Court invited counsel to represent Mr. Altimus.* An Amended Complaint was then entered. (Document 14 on appeal). Motions to dismiss were denied by the District Court Order dated January 25, 1974 (Document 18 on appeal).

The Federal Defendants resisted all efforts by Mr. Altimus to obtain access to his Parole Board file. On April 9, 1974, Mr. Altimus moved for partial summary judgment asserting his legal right to inspect his own file and secure reasons for the denial of parole release. The District Court requested that Mr. Altimus refrain from taking discovery of the Federal and Private Defendants until it ruled on Mr. Altimus' motion for summary judgment on legal claims including the claim that the Board must give reasons for parole denial

* Mr. Altimus agreed to the Court's suggestion that Nicholas A. Robinson, of the bar of this Court, represent Mr. Altimus pro bono publico. A Notice of Appearance was entered September 17, 1973, Document 12 on Appeal.

and give Mr. Altimus access to his file. (Letters of July 31, 1975 and August 5, 1975, Documents 51 and 52 on Appeal).

On October 7, 1974, the District Court denied Mr. Altimus' motion for partial summary judgment as "moot" and left pending his claim for damages. (A19-A29). Within ten days of that ruling, Mr. Altimus moved for reargument. The following March, 1975, the District Court invited counsel to discuss the relevance of several cases involving, inter alia, executive immunity. (Document 45 on appeal). In response the Federal Defendants moved to dismiss on April 1, 1975, and Mr. Altimus opposed dismissal and pressed for reargument.

By September, 1975, with the cooperation of the Parole Board's counsel, Mr. Altimus had arranged for the Court to inspect his prison file in camera as a preliminary to formal discovery to obtain the file. Meanwhile, the Parole Board abandoned its policy of refusing to release parole files [set forth in then §2.50, "Confidentiality of Parole Records" 38 Fed. Reg. 26,657 (September 24, 1973)], and issued new rules permitting a prisoner access to his file [§2.57(d), 40 Fed. Reg. 41,342 (September 5, 1975)]. The Federal Defendants gave Mr. Altimus his file in October, 1975.

When the District Court had still not acted a year and a half later moving to reargue, on April 29, 1976, Mr. Altimus filed a motion renewing his motion to reargue and making a further motion for partial summary judgment. On December 21, 1976, The District Court ruled, dismissing Mr. Altimus' case, and denying Mr. Altimus' motion to reargue after a two year wait and also denying after an eight month delay Mr. Altimus' further motion for partial summary judgment. It is from the District Court's dismissal that this appeal is taken.

C. INSPECTION OF THE PRISONER'S FILE
CONFIRMED THE VALIDITY OF HIS
CLAIMS.

While the motion to reargue was pending, the Board of Parole revised its own rules to allow a prisoner access to his file. Mr. Altimus promptly again made demand for his file and trial counsel for the Board made it available. The facts disclosed at that time formed the basis for Mr. Altimus' renewed motion to reargue and his further motion for partial summary judgment. The file disclosed that the Prison Case Management Team at Sandstone had told the Parole Board that "it would not object to a parole if the Board considered his parole plan realistic and feasible." (AFF. II, Ex. G). The file also discloses that the Hearing Examiner recommended that the case be continued until receipt of Progress Report of the Prison Case Management Team in April of 1973. (AFF. II, Ex. H). Finally, despite these two positions, the file

discloses that only two of the five Parole Board members (Murch and Reed) signed the order reversing the recommendations below and denying parole. Ibid. There were, as the District Court found, no reasons whatsoever in the file explaining the Parole Denial. Counsel for the Parole Board conceded that "the members of the Board of Parole made no record of their decision or the underlying reasons for it other than the notice which was provided to Altimus." [Para 8, affidavit of V. Pamela Davis, sworn to May 10, 1974, Document 27 on appeal].

In fact, there is no evidence that the Board of Parole even considered the file, other than the two signatures on the Board's Order "continue to expiration."

What was Mr. Altimus to infer? His Case Management Team in prison, those closest to him observed that "a long confinement would serve little purpose, and it is possible that supervision control would enable parole success." (AFF. II, Ex. G). His Parole Examiner, who saw him only once, felt that the "file" raised questions and advised waiting a half year to get another prison report before ruling on parole. The two Parole Board members, who never saw Mr. Altimus, decided to continue him to expiration. The

"never-never land" aspect was striking: those who knew less, denied more.

The inferences confronting Mr. Altimus were legion. (AFF. I, paras. 26, 32; AFF. II, paras. 27-8). Perhaps the Board wanted simply to clear its docket and bureaucratically close its file on Mr. Altimus. Perhaps Murch hated Dwyer Act offenders and rejected parole to assure punishment for a full prison term. Perhaps neither Murch nor Reed ever read the file and simply rubber stamped an aide's action. Perhaps the Board members saw deficiencies in the Parole Plan, such as the employer's failure to sign his "Statement of Employer" (AFF. II, Ex. D) and the Private Defendants really are the culprits, knowingly or negligently preparing an inadequate plan. Did Murch and Reed reject parole because, as Mr. Altimus believes, his file showed he had developed skills as a "jail house lawyer" and they want to teach him a lesson? (AFF. II, para. 12).

Only two facts are clear from the file: (1) No reasons were ever recorded to explain or justify the Board's action and (2) the practical effect was to frustrate the intent of Congress in authorizing paroles. The District Court properly found both facts. Mr. Altimus spent thirteen months in jail rather than on parole.

Mr. Altimus' record, following his mandatory good-time parole release under the Probation Office's supervision, and on his own after the mandatory parole ended, has been exemplary. After some time working on his own, he met a woman with a child then separated from her husband. He later married her and moved to Colorado, starting up his own tree trimming business. He and his wife then had a son of their own. Just as a productive and stable family life and work had been established, a back injury suffered when Mr. Altimus fell off a bunk while at Sandstone has flared up, causing a pinched nerve or similar reaction which resulted in Mr. Altimus losing his eye sight. [Para. 3, Affidavit of Nicholas Robinson, sworn to June 25, 1976, Doc. 36 on appeal]. As a veteran, he is now under treatment at a Veterans Administration Hospital in Denver, living with his family in a trailer camp and supporting them with his veteran and social security benefits.

In short, on his own Mr. Altimus has led a responsible and praise-worthy life. It is tragic that his sight should be lost; it is tragic that he was unnecessarily kept in jail during those precious months when he had his sight to enjoy. The District Court found the Parole Board's conduct to be "insensitive and unjustified" (A17). Only an award of damages can even begin to make Mr. Altimus whole for the injury done to him, and the Federal Defendants resist even this under the guise of a purported Executive Immunity.

D. FURTHER RECOGNITION OF THE VALIDITY
OF THE PRISONER'S CLAIMS

A further aspect of the factual and procedural context of this appeal should be recited. Most of Mr. Altimus' claims for due process in parole release proceedings have been now recognized by the Federal Defendants. These due process rights are accorded to prisoners today. Mr. Altimus displayed a remarkable foresight in identifying the Constitutional shortcomings in the parole release process. He pressed claims for law reform, to benefit himself and those similarly situated. He also sought compensatory and punitive damages for the wrongs done to him.

As one after another of his claims was agreed to by the Federal Defendants, his prayers for equitable relief in many respects became moot. The very fact that the Federal Defendants have come to accord the due process rights which Mr. Altimus sought establishes the validity of his claims for damages. The Board provided several of the due process rights when it revised its rules in 40 Fed. Reg. 41,328 (September 5, 1975).

Congressional dissatisfaction with the unconstitutional conduct of the Parole Board members (e.g. AFF, II, Ex. K; AFF, I, Ex. 8), led to enactment of the Parole Commission and Reorganization Act, P. L. 94-233, 90 Stat. 219, amending 18 U.S.C. §4201, et seq., and effective May 14, 1976. New

regulations amending 28 CFR Part 2 became effective October 4, 1976. 41 Fed. Reg. 37,316-37,331 (September 3, 1976). See also Senate Rep. No. 94-468, 3 U.S. CODE CONG. & ADMIN. NEWS 567 (April 26, 1976).

The correctness of Mr. Altimus' legal claims can best be seen by a summary reference to his claims and the current regulations of the U.S. Parole Commission as successor to the Board of Parole:*

Claim By Mr. Altimus

(1) Adequate notice of a parole-release hearing must be given; the four days' notice given to Mr. Altimus was too short. See Am Cmt ¶ 30(a); SJ 1, ¶ b(i).

(2) The Prisoner must have an opportunity to inspect his parole file prior to the hearing; Mr. Altimus was not allowed to see his file before the hearing, only obtaining it in October 1975, 40 F.R. 41,328. See Am Cmt ¶ 30(a); SJ 1, ¶ b(ii).

(3) A prisoner must have an opportunity to reply to adverse information in his file; Mr. Altimus was denied this opportunity. See Am Cmt ¶ 30(a); SJ 1, ¶ b(iii).

Current Parole Rules

(1) 30 days' prior written notice shall be given to a prisoner. §2.12(a) 41 F.R. 37,321.

(2) The Prisoner has the right to examine his file and must be advised of such right before the hearing. §2.12(a), 40 F.R. 37,321 and §2.55, 41 F.R. 37,331.

(3) The prisoner has the right to an opportunity to such a reply in his statement and a record shall be made. §2.12 (d) and §2.13(b), 41 F.R. 37,321.

* As used in this chart, "Am Cmt" means the Amended Complaint, Document 55 on Appeal. "SJ 1" means the first motion for partial summary judgment, Document 25 on Appeal paragraphs in Notice of Motion; "SJ 2" means the second motion for partial summary judgment, Document 33 on Appeal, paragraphs in Rule 9a Statement.

(4) Reasons for a denial of parole release must be recorded; none were in Mr. Altimus' case. See Am Cmt ¶ 30(d); SJ 1, ¶ b(iv); SJ 2, ¶ 7.

(5) A written statement of the reasons for denial of parole release must be provided to the prisoner; Mr. Altimus has never received such a statement. See Am Cmt 30(d); SJ 1, ¶ b(iv); SJ 2, ¶ 8.

(6) A prisoner must be given an opportunity to select persons of his choice to represent him at parole release hearing; Mr. Altimus was not allowed to have any relatives, counsel or others attend or speak at his hearing. See Am Cmt ¶ 30(b) and (e); SJ 2, ¶ 4.

(7) A prisoner must be told of Parole Hearing Examiner and Prison recommendations as to his parole release; Mr. Altimus only learned when he obtained his file in October, 1975. See Am Cmt ¶ 30(f) and (h); SJ 2 ¶ 6,8.

(8) A prisoner must be advised of his procedural rights; Mr. Altimus received only a short oral briefing at his hearing. See Am Cmt ¶ 30(g); SJ 2 ¶ 5.

(9) A prisoner must be given a fair appeal, with a record and opportunity to submit statements, Mr. Altimus had no record nor opportunity to make meaningful statements on appeal. See Am Cmt ¶ 30(k); SJ 2, ¶ 8,9.

(4) The reasons for a parole denial must be recorded in writing. §2.13, 4 F.R. 37,321.

(5) A written statement of reasons for denial of parole release must be provided. §2.13(c), 41 F.R. 37,321.

(6) A prisoner may be represented at a hearing by a person of his choice who can make a statement and provide additional information. §2.12(b), 41 F.R. 37,321.

(7) The Hearing Examiners shall tell the prisoner of their recommendations at the hearings; appeals regionally and nationally shall also disclose recommendations. §2.13(a), 41 F.R. 37,321, §§2.25 and 2.26, 41 F.R. 37,325.

(8) Upon incarceration a prisoner is given a Parole Handbook. 41 F.R. 37,318.

(9) A record is required submissions permitted and a two-tier appellate administrative review is provided. §2.13(d), 41 F.R. 37,321; §2.19, 41 F.R. 37,323; §§2.25 and 2.26, 41 F.R. 37,325.

(10) The prisoner is entitled to have the Parole officials conform to the Administrative Procedure Act; Parole officials refused to afford APA procedures to Mr. Altimus. See Am Cmt ¶ 39-43; SJ 1 and SJ 2.

(11) The prisoner is entitled to be encouraged in seeking rehabilitation through Parole; Mr. Altimus was discouraged instead, primarily by being refused even the reasons for his parole denial. See Am Cmt ¶ 35-7; SJ 1 and SJ 2; 18 USC 4201.

(10) The procedural safeguards of the Administrative Procedure Act are provided in the new regulations, 41 F.R. 37,319-37,331.

(11) Parole considerations on a sophisticated basis using uniform measurement and analysis techniques, with compulsory disclosure of reasons, are provided to assure promotion of sound parole-related rehabilitation. §2.20 41 F.R. 37,322-37,324; 18 USC 4206(a).

In his pleadings, consolidated in his Amended Complaint, Mr. Altimus also presented claims regarding his right to counsel [Am Cmt ¶ 30(b)], his right to confront and cross-examine witnesses [Am Cmt ¶ 30(c)], his right to a neutral and impartial tribunal and not hearing officers who are prison or law enforcement staff [Am Cmt ¶ 30(i)], his right to be present at his appeal and final Parole Board decision [Am Cmt ¶ 30(j)], his right to freedom of speech which was Parole Board members inhibited by their violations of due process [Am Cmt ¶ 45-6], and his right to be protected under the Eighth Amendment cruel and unusual punishment, and denial of parole release in these circumstances was cruel and unusual punishment [Am Cmt ¶ 48-51].

These additional claims were not presented to the Court below. Nonetheless, the Court dismissed them without comment or apparent consideration.

The fact that Mr. Altimus was denied his eleven rights under due process of law and statute, as summarized above, continues to be the basis for his claim for compensatory and punitive damages against the Federal Defendants.

ARGUMENT

I. THE DOCTRINE OF EXECUTIVE IMMUNITY DOES NOT BAR AN AWARD OF DAMAGES TO MR. ALTIMUS

The District Court below found that the Federal Board of Parole never recorded the reasons for denying parole release to Mr. Altimus (A1-A2; A4) nor ever informed him of any reasons for parole denial (A3). The District Court acknowledged that since Morrissey v. Brewer, 408 U.S. 471 (1972), due process required recording and disclosing the reasons for parole denial. U.S. ex rel. Johnson v. Chairman, N.Y.S. Board of Parole, 500 F.2d 925 (2d Cir., 1974), vct. 95 S.Ct. 488 (1974).

This denial was compounded by the Parole Board refusing even to consider a new parole release application plan for Mr. Altimus presented by the Rochester Junior Chamber of Commerce. (AFF. II, paras. 32-7). Moreover, the refusal to admit that reasons were recorded or to report such reasons was repeated to Congressional leaders (including then Senator, now Vice President Mondale) and others who intervened on behalf of Mr. Altimus.

Why the Board acted so is open to speculation. Perhaps the two Parole Board members who passed on Mr. Altimus' case wanted to hear no more from him; with only a year left before the prisoner's mandatory good-time parole they probably wished not to waste time with another parole release since he would be out of jail soon. They reversed the prisoner's Case Management Team and their own hearing officer. Their callous reasons kept Mr. Altimus in jail a year longer than needed, frustrating the Congressional purposes for which parole exists. 18 USC 4203. His precious liberty and opportunity to pursue a new and productive life in New York were lost. He never could take the \$7.10/hour job offered him, losing an income of some \$14,000. In similar circumstances, Courts have made monetary damage awards, such as the award of \$4,500 for a year of imprisonment following improper Parole Board conduct. White v. State, 101 N.Y.S.2d 702 (Ct. Cl., N.Y. 1950).

Instead of proceeding to an inquest to fix damages, however, the District Court dismissed* the Amended Complaint on the grounds that Executive Immunity presented "a complete defense." (A5). In so ruling, the District Court erred, since the Doctrine of Executive Immunity affords a qualified, not a complete privilege, and the Federal Defendants do not satisfy the requirements of the Doctrine.

The criteria for qualification under this Doctrine of Executive Immunity were marshalled by this Court in Economou v. U.S. Dep't. of Agriculture, et al., 535 F.2d 668, 694 (2d Cir., April 23, 1976) cert. granted, sub nom. Butz v. Economou, 45 U.S.L.W. 3554 (Docket no. 76-709, February 22, 1977):

(1) reasonable grounds must exist for the belief that the Parole Board Members' conduct was proper in light of all circumstances at the time, and (2) the belief must have been held in good faith.

No reasonable grounds existed for such a refusal to record or reveal reasons for denial of parole release. As of September, 1972, when it denied parole to Mr. Altimus, the Parole Board certainly knew or had reason to know that the Constitution required that it meet the minimal indices

* Although dismissed under Rule 12, F. R. Civ. P. (A 6), since the District Court made fact findings the dismissal is more one of summary judgment under Rule 56.

of due process. Professor Davis had excoriated the Board's failure to record and furnish reasons. K. DAVIS, ADMIN. L. TREATISE, §16 at 177 (Supp. 1970). Morrissey v. Brewer, 408 U.S. 471 (June 29, 1972) had been given by the Supreme Court two months before the Parole Board denied Mr. Altimus' parole release application, and necessarily governed the Board's conduct.

Mr. Altimus saw the logical application of Morrissey v. Brewer to his situation. (AFF. I, para. 32). So did the student law review editors of NOTE, "Curbing Abuse In The Decision To Grant Or Deny Parole," 8 HARV. CIV. RIGHTS COV. LIBERTIES L. REV. 419 (1973), and Harold Parsons-Lewis, "Due Process In Parole-Release Decisions," 60 CALIF. L. REV. 1518 (1972). So have the Courts subsequently. E.g. U.S. ex rel. Johnson v. Chairman, supra, and cases cited therein; Haymes v. Regan, 525 F.2d 540 (2d Cir. 1975); and Mower v. Britton, 504 F.2d 396 (10th Cir., 1974).

In short, every "reasonable" analysis of the Parole Board's obligation for recording and disclosing reasons for the denial of parole release to Mr. Altimus had reached a conclusion at variance with the Board of Parole's recalcitrant posture. The Board could not even articulate, either to Mr. Altimus or Members of Congress or the Rochester Jaycees, why

it did not record or disclose its reasons for denying a parole plan, except to say no statute required it. As the District Court below noted, "We are compelled to agree with Mr. Altimus that the Board's response to his repeated efforts to find out the reasons for his parole denial and to his effort to seek reconsideration was 'bureaucratic and oblique.'" (A4) (AFF. I, para. 28).

There is not a shred of evidence in the record to show that the Board of Parole Members could have had reasonable grounds to act as they did. The District Court could point to none (A5-A6). Instead, the District Court viewed the law as stated in Menechino v. Oswald, 430 F.2d 403 (2d Cir. 1970), cert. den. 400 U.S. 1023 (1971), as being radically changed by U.S. ex rel. Johnson v. Chairman, supra, and concluded that government officials are not charged with predicting the future course of Constitutional Law. (A 6). However, by its own terms, U.S. ex rel. Johnson v. Chairman, 500 F.2d at 928, set no new course of law. It simply applied Morrissey v. Brewer, supra.

Even the Board of Parole acted as if it knew that it lacked any basis for refusing to record or report reasons for a parole release denial. It developed a form to report

reasons (AFF. I, Ex. 7) and began using the form in October of 1972 at some Federal prisons but not at Sandstone. (AFF. II, Ex L.) Prisoners, including Mr. Altimus soon learned of this action. (AFF. I, para. 30.) If the Board cared enough to experiment in giving reasons for parole release denial at several prisons, it certainly could have given out reasons at the same time for Mr. Altimus' case.

Since reasonable grounds for the Parole Board's posture did not exist, no good faith belief in any such grounds could have existed. Indeed, the callous disregard of Mr. Altimus' extensive and anguished efforts to obtain the reasons for the Parole Board's action is tantamount to bad faith. If the Board members possessed any grounds for "good faith" belief, they never presented them here. Neither Board members Murch nor Reed ever submitted a personal affidavit. The several slim affidavits on information and belief provide no factual basis for the District Court to sustain a finding of good faith. The inference arising from the failure of Murch or Reed to submit their affidavits [as was done in U.S. ex rel. Harrison v. Pace, 357 F.Supp. 354 (E.D. Pa. 1973)],* is that the Board of Parole lacked valid

* Defendant Reed, a former Parole Board Chairman, also testified personally in Childs v. U.S. Board of Parole, 371 F.Supp. 1246 (D. D.C., 1973).

reasons to deny parole release and rejected any and all parole simply to be rid of Mr. Altimus.

Thus, the criteria for the Federal Defendants to qualify for Executive Immunity are absent here. Mr. Altimus' request was not so burdensome; reasons, if they existed, could have been given. At the time, Morrissey v. Brewer had been explicit in providing that reasons must be given for "future revocations of parole" and arguable future denials of parole release. 408 U.S. 471 at 490. The effect of the Parole Board's refusal to disclose the reasons for its action frustrated Congressional parole objectives. This Court noted that such action would frustrate the very purpose of parole in its decision in U.S. ex rel. Johnson v. Chairman, supra at 929 and 932:

"...a statement of reasons will permit the receiving court to determine whether the Board has adopted and followed criteria that are appropriate, rational and consistent, and also protects the inmate against arbitrary and capricious decisions or actions based upon impermissible considerations. ...

"Besides safeguarding against purely arbitrary denials of parole, a reasons requirement can serve the important function of promoting rehabilitation by relieving 'inmates' frustration and letting them know how they might be improving their prison behavior or taking steps with respect to some other factor in doubt (e.g. prospective employment or housing), better their chances for release."

In short, the arbitrary and capricious action by Parole Board Members Murch and Reed violated Mr. Altimus' rights and subsequently was covered up by Parole Board Chairman Sigler in his letters (AFF. I, Ex. 9). It resulted in a loss of liberty and income for a period of over a year and cast a needless aspersion on a man who was viewed as qualified for parole by his prison case workers and his parole plan contacts. The insult is akin to a defamation of character and is felt keenly by Mr. Altimus to this day (AFF. II, paras. 8c, 53-59). Professor Jaffe has posited exactly such a case as being appropriate for damages. Louis L. Jaffe, "Suits Against Governments and Officers: Damage Actions" 77 HARV. L. REV. 209 at 228-235 (1963).

Since the Federal Defendants had no statutory or constitutional basis for their procedural misconduct, they manifestly were acting outside the scope of their official duties. The discretionary authority to grant or deny parole does not excuse Board of Parole members from adhering to basic due process of law. Morrissey v. Brewer, supra; U.S. ex rel Harrison v. Pace, supra. The chronicle of callous disregard for Mr. Altimus' rights can never be deemed to have been "within the outer perimeter of the officer's line of duty." Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 456 F.2d 1339, 1345 (2d Cir., 1972), on rem from 403 U.S. 388 (1971).

The improper loss of liberty here, with the attending consequences accentuated by Mr. Altimus' prison injury and later loss of sight, cries for redress. Mr. Altimus deserves compensation for the Federal Defendants' unauthorized conduct as much as did the plaintiffs in Hughes v. Johnson, 305 F.2d 67 (9th Cir. 1962); Kelley v. Dunne, 344 F.2d 129 (1st Cir. 1965); Kozlowski v. Ferrara, 117 F. Supp. 650 (S.D.N.Y. 1954).

In these circumstances, it is inequitable to acknowledge the validity of Mr. Altimus' claim and yet to bar him from receiving damages. Executive Immunity is inapplicable to the case at bar.

II. THE ADMINISTRATIVE PROCEDURE ACT
GOVERNED THE BOARD OF PAROLE, RE-
QUIRING THAT REASONS FOR BOARD
CONDUCT BE RECORDED AND DISCLOSED

The District Court stopped short of ruling that the APA applies to the Parole Board (A7-A8). Professor Davis has long contended that §6(d) of the APA, 5 USC §555(e) does govern the Board of Parole. The Board of Parole meets the APA statutory definition of an "agency" 5 USC §441(1), and a parole release denial is within the definition of "agency action" 5 USC §551(13).

This Court reserved its own decision on the applicability of the APA to the Parole Board. U.S. ex rel. Johnson v. Chairman, supra, note 7. Nonetheless, other Courts have ruled that the APA does govern the Board. Thus, Pickus v. U.S. Board of Parole, 507 F.2d 1107 (9th Cir., 1974), King v. U.S., 492 F.2d 1337 (7th Cir. 1974), and Mower v. Britton, 504 F.2d 396 (10th Cir. 1974), have decided that the APA does govern the Parole Board, although the District Court below has concluded otherwise (A8).

As of 1972, Professor Davis and others had put the Board on notice that the plain meaning of the APA embraced it. See e.g. U.S. ex rel. Johnson v. Chairman, supra, note 7, citing a Resolution of the Administrative Conference of the United States, June 9, 1972.

The ruling in Pickus v. U.S. Board of Parole, 507 F.2d 1107 (9th Cir., 1974), was confirmed by Congress last year in Section 4218 of the Parole and Reorganization Act, supra. See House Conference Report No. 94-838, 3 U.S. CODE CONG. & ADMIN. NEWS at 600-601 (April 26, 1976). There can be no doubt but that the Parole Board members were in violation of the APA.

Out of whole cloth, the District Court below sanctioned the Parole Board's right to "experiment" in giving out reasons for parole release denials to inmates in some prisons, but not in others (A 8), and somehow therefore not in the individual case of Mr. Altimus. No basis or authority for such unequal treatment of similarly placed persons exists. A uniform experiment for inmates in all prisons, conforming with the strictures of the APA, would perhaps suffice, but not the selective and discriminatory experiment employed here.

The violation of the APA was clear and parallels the constitutional violation of minimal due process. In not ruling so, the District Court erred.

III. THE DISTRICT COURT ERRED IN
DENYING REARGUMENT AND DIS-
MISSING MR. ALTIMUS' CLAIMS
AGAINST THE FEDERAL DEFENDANTS

As shown above (pp. 16-18), the District Court dismissed three categories of claims against the Federal Defendants: (i) the violations of due process in failing to record reasons for parole release denial and communicate such reasons to Mr. Altimus, as found by the District Court; (ii) the other violations of due process, the APA, and the parole laws, as

set forth in the chart above but not ruled upon by the District Court; and (iii) the further claims recited in the Amended Complaint, denied by the Federal Defendants in their Answer but never presented to the Court by way of summary judgment or otherwise.

Absent Executive Immunity, the liability found by the District Court in category (i) above is a sufficient basis for assessing damages. The District Court erred in not expressly ruling on the other due process and statutory claims listed in category (ii). The claims in category (iii) have yet to be tried. They state a claim, as the Federal Defendants' concede in answering rather than moving to dismiss under Rule 12(b), F.R. Civ. P. They should have been tested by either trial on the merits or summary judgment.

These due process damage claims are cognizable in Federal court. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971); Lynch v. Household Finance Corp., 405 U.S. 538 (1971); Amos Treat v. SEC, 306 F.2d 260 (D.C. Cir., 1962) and cases cited therein.

Similarly, the statutory denials can provide the basis for establishing liability for damages also. The civil remedy certainly is implied here. N.Y.C. Coalition For Community Health v. Lindsay, 362 F. Supp. 434, 438-9 (S.D.N.Y., 1973,

Gurfein, D.J.); cf. Wills v. T.W.A., 200 F. Supp. 360 (S.D. Cal., 1961); Fischman v. Raytheon Mfg. Co., 188 F.2d 783 (2d Cir., 1951); Reader v. Hirsch, 197 F. Supp. 111, 114 (S.D.N.Y. 1961). See generally, NOTE, "Implying Civil Remedies From Federal Regulatory Statutes", 77 HARV. L. REV. 285 (1963).

Mr. Altimus sought summary judgment since the facts were not in dispute and the law was clear. The authorities which he marshalled in support of summary judgment were in large part the same authorities which this Court relied upon in U.S. ex rel. Johnson v. Chairman, supra. Summary judgment was sought to resolve basic legal issues and smoke out any facts which might appear inconsistent with the prima facie case Mr. Altimus had then set forth in his Amended Complaint (Document 14 on Appeal) and affidavit in support of partial summary judgment (AFF. I). Such a procedure was sanctioned by this Court in Donnelly v. Guion, 467 F.2d 290, at 293-4 (2d Cir., 1972).

Thus instead of dismissal, the Court should have granted summary judgment against the Federal Defendants. The denial of reargument on the claims in category (i) was also in error.*

* With respect to the denial of reargument, the following should be noted. At the time of his first motion for summary judgment, Mr. Altimus was under the supervision of the U.S. Probation Office in Miami, Florida, having been released on parole at Sandstone because of his accrued good time credits (AFF. I, para 1). The District Court found that Mr. Altimus' claims were "moot" (A23-A25)

(Footnote continued)

because of Mr. Altimus' release and new regulations which the Parole Board had granted. The District Court did note that the Parole Board still refused to furnish Mr. Altimus with the right to inspect his file (A24). It nevertheless declined to rule on whether the facts presented by Mr. Altimus established liability, noting only that Mr. Altimus' damage claims (Amended Complaint, Para D and E, Doc. 14 on appeal) were not moot and that a liability ruling should await trial.

Mr. Altimus then promptly moved on October 18, 1974 for reargument, since he needed access to his parole release file in order to proceed and since his claim for a set of reasons for his parole denial was not at all moot but involved "an immediate and definite governmental action or policy that...continue[d] to affect a present interest." Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974). Instead of ruling, the Court sat on this motion until December 21, 1976, then denying reargument because (i) no new facts were adduced (A2-A3), (ii) access to the parole file was given in the interim (A19, footnote 1), and (iii) the Declaratory Judgment Act does not function to allow a party to clarify legal rights preliminary to trying damage claims. Although Mr. Altimus disagrees with these contentions, in view of Weinstein v. Bradford, 423 U.S. 147 (1975) there was less reason to contest the procedural aspects of reargument. The matter of damages continues for the Federal Defendants' failure to provide access earlier or for the continuing failure to provide reasons for the denial of release on parole.

Denial of reargument, however, was justified by a set of inadequate make-weights. Reargument was urged to permit the Court to consider its apparent failure to weigh the fact that the Federal Defendants never recorded nor disclosed the reasons for parole denial and therefore that matter could not be moot. By October 1, 1974, the Parole Board had revised its rules, 40 Fed. Reg. 41342 (September 5, 1975), and voluntarily gave a copy of Mr. Altimus' file to him. The facts in that file corroborated the key facts apparently overlooked by the District Court. At this point reargument became even more important. Access to the file alone did not moot the question of liability for failure to disclose the file during the parole release proceedings. Declaratory Judgment could have served to resolve the principal further claim as to whether the Parole Board should have given reasons for denying parole release. That was, of course, before the ruling in Bradford.

IV. THE DISTRICT COURT ERRED IN DISMISSING
MR. ALTIMUS' CLAIMS AGAINST THE PRIVATE
DEFENDANTS

The District Court ruled that (i) there is no evidence of causality linking the efforts of the Private Defendants to the fact that parole was denied (A14-A15), (ii) that Mr. Altimus showed no facts that the plan was inadequate in any way (A14), and (iii) that in any event Mr. Altimus made no claim that the Private Defendants ever assured him the parole plan they prepared would be adequate.

The Court found that diversity jurisdiction was present over the claims sounding in tort but dismissed the claims premised on denials of civil rights under 42 USC 1983. (A11).

(Footnote continued)

Even if the Bradford ruling has the effect of validating the belated denial of reargument, there remains the District Court's more substantial error in dismissing Mr. Altimus' claims altogether. In both substantive opinions below, the District Court sought to evade Mr. Altimus' claims and not deal with them squarely. Much of the "mootness" as to equitable relief arose because the District Court moved inordinantly slowly in ruling on Mr. Altimus' motions. The executive immunity issue, for instance, should have been raised in 1973, not after extensive motion practice on the merits.

Since the Court had previously found that Mr. Altimus stated a claim for relief when it denied the Private Defendants' motions to dismiss under Rule 12, F.R.Civ.P., Order dated January 25, 1974 (Document 18 on Appeal), and since the District Court made findings of fact based on the record, it seems that the dismissal is in the nature of a summary judgment on the pleadings and not under Rule 12.

Moreover, until and unless Federal Defendants Murch and Reed ever disclose why they denied parole release, or affirmatively state that it was for reasons other than the sufficiency of the parole plan, the inference remains that the Private Defendants prepared a defective plan.

The record supports this inference as follows: The Society undertook to help Mr. Altimus, inter alia, by securing the assistance of the Manhood Foundation. The Manhood Foundation, in turn, secured the needed employment with the H.F.J. Construction Company. The form which the H.F.J. Construction Company submitted for the parole application (AFF. II, Ex. D) lacked the required signature of the Company's President, Harold M. Stewart. Could that have been the reason why parole was denied? The District Court erred in saying that no facts such as this one were in the record.

Since the H.F.J. Construction Company and Mr. Stewart flouted the service of the U.S. Marshall, never responded to papers served on them by counsel for Mr. Altimus, and are in default as the Clerk of the District Court entered below, there is the further inference that this employer is irresponsible and that the Parole Board members may have known that fact. Could this be the reason why parole was denied?

Since the Society and the Manhood Foundation acted as good Samaritans in assisting Mr. Altimus to secure a job with the H.F.J. Construction Company, Mr. Altimus contends that both are responsible for any deficiencies in the parole plan attributable to the H.F.J. Construction Company. See e.g. Zelenko v. Gimbel Bros., 287 N.Y.S. 134 (Sup. Ct., N.Y. Co., 1935); Black v. N.Y., N.H. & H.R.R., 193 Mass. 448, 79 N.E. 797 (1907); HARPER & JAMES, TORTS, § 18.6 (1956). Having undertaken to act voluntarily, the "reasonable man" test applies to the Private Defendants and they are obliged to prepare an adequate plan. The District Court erred in ruling otherwise.

Until the issue of causality is resolved by either finding the Federal Defendants exclusively liable, or by permitting the discovery of defendants March and Reed which the District Court had requested be held off until after its summary judgment rulings, the District Court cannot resolve the causality issue against the Plaintiff.

Thus, the tort claims against the Private Defendants are as strong as ever and the claims should not have been dismissed.

CONCLUSION

Liability should be found against the Federal Defendants and the matter remanded for an inquest to fix damages. Alternatively, the District Court should be reversed, all claims against both Federal and Private Defendants reinstated, and the proceedings allowed to continue through discovery and trial.

Dated: New York, New York
March 10, 1977

Respectfully submitted,

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APPENDIX

Mr. Altimus proceeding in forma pauperis provides here his Appendix setting forth, pursuant to F.R. App. R. 30, to Section 30(1) of the Rules of the U.S. Court of Appeals for the Second Circuit and to agreement among the parties (i) the two substantive rulings of the District Court below, including the Judgment of Dismissal, (ii) the Index to the Record on Appeal. Defendants-Appellees have undertaken to annex to their Briefs any portions of the Record relevant to their positions.

1. Memorandum and Order dated December 21, 1976 (Document 37 on Appeal), pp. A1-A19.
2. Memorandum and Order dated October 7, 1974 (Document 20 on Appeal, pp. A20-A28).
3. Index to Record on Appeal, pp. A28-A32.

LASKER, D.J.

In 1973 Richard Altimus, a federal prisoner incarcerated at Sandstone, brought this action for injunctive and declaratory relief, and for damages, against members of the United States Board of Parole and the federal Bureau of Prisons, claiming that his application for parole was wrongfully denied without adequate procedural protections. Mr. Altimus also sued several private corporations, individuals and religious groups, claiming that they "deliberately and wilfully" sought to "prevent plaintiff from securing an effective parole plan," by virtue of their activities in apparently providing him with a parole release plan.

Mr. Altimus first applied for parole in January of 1972, at which time institutional staff indicated to him that his parole release plans would be considered too vague by the parole board; he withdrew his application and, after completing arrangements with the private defendants, reactivated the application in June, 1972. On August 10th, he was advised that he would have a hearing before a parole board hearing examiner (Mr. Vodvarka) on August 14th. Following this hearing, the examiner recommended to the Parole Board that Mr. Altimus be denied parole, but that his case be reviewed by a Progress Report in April, 1973. Without recording the reasons for its

action, the Board (acting through two of its members) simply denied parole and "continue[d] to expiration" meaning, no anticipated further review. Mr. Altimus was mandatorily released from confinement in October, 1973. (opinion filed October 8)
On October 7, 1974, the court denied plaintiff's motion for partial summary judgment and for a declaratory judgment that the Board's action in denying him parole violated his Fifth Amendment due process rights, on the grounds that the claims for relief had been mooted by his release from prison and by subsequent development of administration regulations which afforded the sought for relief.

Altimus now seeks partial summary judgment against the federal defendants on the liability aspect of his claim for damages, and also seeks to reargue the court's earlier decision of October 8, 1974. The federal defendants move to dismiss for failure to state a cause of action, failure to state a claim upon which relief can be granted, and lack of subject matter jurisdiction. They are joined by the private defendants, whose previous motion to dismiss for lack of jurisdiction and failure to state a claim had been denied on January 28, 1974 without prejudice to renewal after discovery was had.

I. Plaintiff's Motion to Reargue

Plaintiff's motion to reargue the decision of October 8, 1974 is denied. Plaintiff does not point to any

legal authority or factual material which was previously overlooked but argues merely that declaratory relief is a necessary predicate to vindication of his claim for damages which is still before this court.^{1/} This is not a function of the Declaratory Judgment Act, and, for the reasons outlined in the earlier opinion and for other reasons which will appear below, the motion to reargue is denied.^{2/} See Bradford v. Weinstein, 423 U.S. 147 (1975) (per curiam).

II. Plaintiff's Motion for Partial Summary Judgment;
Federal Defendants' Motion to Dismiss

Plaintiff claims, in essence, that the federal defendants (1) violated his constitutional right to procedural due process by inter alia, failing to provide him with reasons for his parole denial, and (2) violated his rights under the federal Administrative Procedure Act by not affording reasons for his parole denial. (Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Motion to Dismiss, April 29, 1976 at 2-3) Since it is conceded that plaintiff was never informed of the reasons for his parole denial, plaintiff claims to be entitled to summary judgment on the question of liability.

It is beyond dispute in this circuit that a prisoner has a due process right to be informed of the reasons for

his parole denial. United States ex rel. Johnson v. Chairman, N.Y. State Bd. of Parole, 500 F.2d 925 (2d Cir.) vacate as moot, 95 S. Ct. 488 (1974); Haymes v. Regan, 525 F.2d 540 (2d Cir. 1975). The necessity of this constitutional requirement is poignantly illuminated by the instant case: Mr. Altimus, who had gone to great lengths to prepare a parole release plan which he thought would be acceptable to the Board, and who participated in rehabilitative programs at Sandstone and believed himself to be ready for parole, was denied parole. Despite repeated inquiries by himself, members of Congress, and other "free world" persons desirous of aiding him in securing parole release, he was never informed of the reasons why he was denied parole. The only response ever received to these inquiries was an iteration of the general factors considered by the Board in reaching its decisions. Indeed, the parole file on Mr. Altimus, made available to him in the course of this litigation, reveals that no reasons were ever recorded for the Board of Parole's actions in his case.

We are compelled to agree with Mr. Altimus that the Board's response to his repeated efforts to find out the reasons for his parole denial and to his effort to seek reconsideration was "bureaucratic and oblique" (Altimus Affidavit of February 18, 1974, ¶28); "the Board refused even to tell me why they would not tell me the

reasons for my parole turndown." (Altimus Affidavit supra, ¶30) Moreover, his analysis of Morrissey v. Brewer, 408 U.S. 471 (1972), has been adopted by many courts which have held that there is simply no legitimate state interest in not providing prisoners with the reasons for parole denial, particularly since "the prospect of parole can[not] be a positive force in my rehabilitation as a prisoner if the reasons for denying me parole are hidden. What can I do? How can I change?" (Altimus Affidavit, ¶32) See United States ex rel. Harrison v. Pace, 357 F.Supp. 354 (E.D. Pa. 1973); Childs v. U.S. Bd. of Parole, 371 F.Supp. 1246 (D.C. 1973); aff'd in part, 511 F.2d 1270 (D.C. Cir. 1974); Bradford v. Weinstein, 519 F.2d 728 (4th Cir. 1974), vacated as moot, 423 U.S. 147 (1975).

However, because the only presently available relief is an award of damages, the public official defendants may interpose as a complete defense their good faith reliance on existing procedures which they reasonably believed to have been constitutional. See Scheuer v. Rhodes, 416 U.S. 232 (1974); Woods v. Strickland, 420 U.S. 308 (1975); Economou v. U.S. Dept. of Agriculture, Docket No. 76-6050 (2d Cir. April 23, 1976), slip op. at 3409. On this defense (which has been raised), they are entitled to prevail as a matter of law and hence, the claim for damages

is one on which relief cannot be granted and must be dismissed. F.R. Civ. Proc. 12.

Government officials in the performance of their public duties are not "charged with predicting the future course of constitutional law." Pierson v. Rhay, 386 U.S. 547, 557 (1967); McKinney v. DeBord, 324 F.Supp. 928 (E.D. Cal. 1970). When a new constitutional rule under which a defendant is sued abruptly departs from the rule in effect at the time of the alleged deprivation of constitutional rights, the plaintiff, as a matter of law, can have no claim for damages.^{See} Baxter v. Birkins, 311 F.Supp. 222, 225 (D. Colo. 1970) (3-judge court); McKinney v. DeBord, supra, 324 F.Supp. 928. Altimus was denied parole in September of 1972; he was mandatorily released from custody in October of 1973. During this entire time period, the prevailing rule in this circuit was that of Menechino v. Oswald, 430 F.2d 403 (2d Cir. 1970) cert. denied, 400 U.S. 1023 (1971), which held that a prisoner seeking parole release had no interest entitled to due process protection in the grant or denial of parole; and that consequently, he was entitled to no procedural rights whatsoever: no right to reasons for denial, no right to be informed of the charges against him; no right to counsel, or to call or confront witnesses. This circuit did not change its position until 1974, in the Johnson case. That this change was an abrupt one, and one

not necessarily dictated by the decision in Morrissey v. Brewer, 408 U.S. 471 (1972) (which occurred two months before Altimus was denied parole) is indicated by the vigorous dissent of Judge Hays in the Johnson case, and the subsequent diversity of opinion on this subject in the various federal courts of appeal. Compare Childs v. U.S. Bd. of Parole, supra, 511 F.2d 1270 (D.C. 1974); Bradford v. Weinstein, supra, 519 F.2d 728 (4th Cir. 1974); with Bell v. Kentucky Bd. of Parole, remanded for consideration of mootness sub nom. Scott v. Kentucky Bd. of Parole, 45 U.S.L.W. 4009 (U.S. Nov. 2, 1976). Were Altimus claiming that he had been denied reasons after the Johnson decision, his claim would stand on a different footing, and could certainly not be dismissed as a matter of law; however, the defendants' failure to comply with constitutional requirements not enunciated until after the action complained of occurred and in fact expressly rejected just two years beforehand cannot be a basis for liability in damages, whether they are sued individually or in their official capacities.

Similar reasoning requires dismissal of any claim for damages based on a failure to follow the requirements of the Administrative Procedure Act. Whatever the courts may finally decide about its applicability to the federal parole board, our research indicates that up through the

time in question here every court which had considered the question found that the APA did not apply to the federal Parole Board. See Hyser v. Reed, 318 F.2d 225 (D.C. Cir.) (en banc), cert. denied, 375 U.S. 957 (1963); Hiatt v. Campagna, 178 F.2d 42, 44-45 (5th Cir. 1949) (dictum), aff'd by equally divided court, 340 U.S. 880 (1950). Cf. King v. United States, 492 F.2d 1337 (7th Cir. 1974); Mower v. Britton, 504 F.2d 396, 399 (10th Cir. 1974) (holding that APA requirement of reasons for parole denial did apply to the federal board was not retroactively applicable).

Plaintiff argues that the federal defendants were in fact using a form on which other prisoners were advised of reasons for their parole denial at the time he was denied parole, that this in turn manifests the Board's awareness of the constitutional requirements that reasons be provided, or (as Professor Davis argued in 1970) of the applicability of §555(e) of the APA, which suggest that there is at least an issue of fact as to their good faith. However, plaintiff's Exhibit F, submitted to support this factual contention, is an undated form for recording reasons for parole action and parole denial allegedly used by the Board. Moreover, plaintiff's Exhibit L confirms the government's position that reasons for parole denial were given on an experimental basis beginning in late 1972 to prisoners at five selected federal

institutions (not including Sandstone, where Mr. Altimus was incarcerated). Additional confirmation that the giving of reasons was in an experimental and limited stage at that time is found in Battle v. Norton, 365 F.Supp. 925, 926 (D. Conn. 1973). There, Judge Newman found that the Board began an experimental program of supplying reasons for parole denial in December, 1972 at the Board's Northeast Region institutions; because the program was experimental, Judge Newman refused to hold that the Board's failure to give all reasons for its decision (in September of 1973) violated any rights of the would be parolee. The Board was and is free to experiment with improvements in its decisionmaking without those experiments affording a basis for liability where the "experiment" is later held to have been required by due process and an inmate not included in the experimental group claims his rights were violated and seeks damages.

In United States ex rel. Harrison v. Pace, 380 F. Supp. 107 (E.D. Pa. 1974), on which plaintiff relies to support his argument that he has a cause of action for damages arising out of violations of his Fifth Amendment due process rights, the court dismissed the damage claims against the federal defendants (after holding that they did state a cause of action) on the grounds that defendants were protected from liability by their good faith reliance

on existing law and procedure. There, the refusal to afford reasons for a denial of parole in April, 1972, had continued up through 1974. Although the procedural posture of that case was somewhat different from the instant one, in that the defendants had moved for summary judgment and had submitted uncontested affidavits which established their good faith, in light of the caselaw in this circuit at applicable time periods the court is justified in holding as a matter of law that defendants cannot be liable for their failure to afford Altimus procedural rights later held to be constitutionally required. See also Wolff v. McDonnell, 418 U.S. 539 (1974) (holding re procedural due process requirements at prison disciplinary proceedings not to be retroactively applied).

Accordingly, plaintiff's motion for summary judgment is denied, and the federal defendants' motion to dismiss the complaint is granted.

III. The Private Defendants' Motion to Dismiss

The private defendants who have moved to dismiss the complaint on the grounds that it fails to state a claim upon which relief can be granted are: The Society of St. Vincent De Paul, a charitable religious organization and two of its employees, Joseph Fitzpatrick and Virginia Russell, who referred plaintiff to the private defendant

Manhood Foundation when he wrote to them asking for help in formulating a release plan; and the Manhood Foundation, a counselling service for ex-convicts and its employee Robert Johnson, who found a construction job with H.F.J. Construction Co. ^{3/} for plaintiff in the summer of 1972 and who volunteered to serve as his community parole adviser. On January 28, 1974 the court denied an identical motion to dismiss made by these defendants without prejudice to renewal after plaintiff had been allowed a reasonable time for discovery of the federal defendants. The motions to dismiss were renewed by letters dated March 25 and April 10, 1975 on behalf of the Manhood Foundation, Inc. and Robinson, and by letter dated April 7, 1975 on behalf of the remaining private defendants, the Society of St. Vincent De Paul, Joseph M. Fitzgerald and Virginia Russell.

The court agrees that there is no jurisdiction under 42 U.S.C. §1983 as against these defendants; there are simply no plausible allegations that they were acting in concert with any of the official defendants, and the mere fact that they are incorporated under the law of a state does not create sufficient state action to sustain a claim under §1983.

However, there is diversity jurisdiction between plaintiff, who resides in Florida, and the private defend-

ants, all of whom reside in New York. Plaintiff seeks well over \$10,000. damages from the private defendants and in light of the claimed injury, it is reasonable to assume that the jurisdictional amount is met. See United States ex rel. Harrison v. Pace, supra, 380 F.Supp. at 110, n.1.

As has been indicated, the primary reason for denying the earlier motions to dismiss was to allow plaintiff time for further discovery. In the two years that have passed since that decision, plaintiff has had complete access to the federal parole board's file on him and, so far as the court is aware, has conducted no other discovery of the federal defendants. Discovery of the private defendants was stayed pending discovery of the federal defendants. It is our view that the elements of a cause of action against these defendants under state law simply do not exist and that the motion to dismiss should be granted.

The plaintiff has never set forth precisely the legal theory under which he seeks to hold these private defendants liable for his parole denial. There is no factual basis for a state law contractual claim; plaintiff does not claim to have given any consideration for the defendants' services in providing or attempting to provide him with an acceptable parole release plan. Thus, any

claim plaintiff has must sound in tort, and would be for the intentional or negligent preparation of a parole release plan which the defendants knew or should have known would be inadequate and which caused the Board to deny him parole when it otherwise would have granted parole.

Thus, to establish a cause of action against these defendants, plaintiff would have to be prepared to show the following: 1) that defendants undertook to provide him with an adequate parole release plan; 2) that defendants negligently or intentionally failed to provide such a plan; 3) that their failure caused the Board to deny him parole when it otherwise would have granted him parole; and 4) that he was thereby injured.

First, it must be noted that the plaintiff does not claim that these defendants purported to assure him that the parole plan would be adequate. (See ¶¶ 5-13 of Altimus Affidavit, signed February 18, 1974; ¶¶ 13-18 of the Amended Complaint) Indeed, it would appear that the individual defendants agreed to perform certain discrete tasks for Mr. Altimus: to place him in contact with a counselling service; to find him a job; to agree to act as his parole adviser. (Id.; Affidavits of Fitzpatrick and Russell, filed November 8, 1973; Affidavit of Robert Robinson, filed October 17, 1973) And it further appears from their uncontested affidavits and the documents in

evidence before the Parole Board, that they performed these tasks. See Plaintiff's Exhibits C, D and E.

Second, and more significant, the plaintiff has pleaded absolutely no facts which show that the "plan" was actually inadequate in any way. Indeed, after reviewing the documents submitted by these defendants on his behalf the court is in agreement with Mr. Altimus' original belief (13, Affidavit) that "all preparation had been thoroughly and competently made for my parole application and that through the Archdiocesan Central Council, the Manhood Foundation and Robinson, and the H.J.F. Company, I had a plan which would be acceptable to the U.S. Board of Parole." Although the complaint alleges that the defendants knew or should have known the parole plan was inadequate, he has nowhere informed the court in what way the plan was in fact inadequate; much less of the basis for his belief concerning these defendants' knowledge; and after three years, it is not too much to expect that if there were an objective basis on which it could be claimed that the plan at the time it was submitted was inadequate, it would be asserted.

Finally, and perhaps most devastating to plaintiff's claim against these private defendants, is the question of causality. There is no evidence whatsoever that Altimus was denied parole because of any inadequacy

in his parole plan. Altimus seems to be relying on the recommendation of the prison "case management" team in the Special Progress Report prepared on August 2, 1972:

"The Case Management Team would not object to a parole if the Board considers his parole plans realistic and feasible."

Altimus apparently wants the court to infer that this recommendation was tantamount to an assurance that if t. parole plan were adequate, he would be granted parole; and since he was not granted parole, it must be because of the parole plan. To work this lukewarm endorsement of parole by prison staff into such a chain of inference is wholly unwarranted. There is (or certainly was) no right to be released on parole, even with a splendid parole release plan. Under the parole statute in effect at the time of these events, the decision whether or not to release on parole was clearly committed to the discretion of the Parole Board:

"If it appears to the Board of Parole from a report by the proper institutional officers or upon application by a prisoner eligible for release on parole, that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole." 18 U.S.C. §4203(a).

Altimus was not entitled to rely on this statement by the institutional staff as any kind of assurance that he would receive parole if his plan met Board approval, and the private defendants are not liable to him for any such misplaced reliance.^{4/}

Moreover, those portions of the hearing examiner's summary which plaintiff has chosen to put before the court affirmatively show that the hearing examiner did not rely on the adequacy vel non of the parole plan as a basis for his recommendation that parole be denied, with reconsideration in April 1973. Indeed, there is absolutely nothing in the file to indicate that anyone viewed the parole plan per se as inadequate. The Board overruled the hearing examiner to the extent that it simply denied parole, and continued him to expiration of his sentence (which occurred in October of 1973), without provision for interim review. It is true that the Board's failure to record its reason for its actions makes it impossible to determine, with certainty, that its view of the parole release plan did not play a part in its decision; however, it is even less possible to prove that it did, and the burden is on the plaintiff to establish causality. Finally, any injury to Altimus would appear to flow from the Board's failure to disclose its reasons and not from any claimed inadequacy in the plan - for if the Board had informed

Altimus of its reasons, and if they indicated an inadequate parole plan, Altimus could have attempted to remedy the defect. (In fact, Altimus did arrange for a new plan for parole release and a new advisor; the Board when advised of these facts, declined to change its earlier decision.) (See Plaintiff's Exhibits M, N) Taken together with plaintiff's complete failure to specify in what respects the plan could be regarded as defective, or the extent to which defendants knew or should have known of the defect, and the absence of any factual allegation that the defendants had assured plaintiff that it would pass muster with the Parole Board, it is now apparent that the "sketchy" allegations which the court found could be liberally construed to frame a cause of action back in January of 1974 simply do not do so. To permit any discovery of the private defendants at this time, when the cause of action against them has been revealed as lacking in so many critical elements as to be almost frivolous, would be altogether unjustified.

This is not to say that the court does not sympathize with Mr. Altimus, who was certainly treated in an insensitive and unjustified fashion by the federal defendants. That it was not clearly unconstitutional for them to act in such a manner in 1972 and 1973, and to deny Mr. Altimus parole despite an apparently adequate

parole plan without explaining the reasons for its decision, is an upsetting reflection on how long it has taken our legal system to recognize this basic constitutional right. However, to permit these proceedings to bleed on with respect to the private defendants would also be unjust; for there is simply no evidence to support the claimed cause of action against them.

The motion of the private defendants to dismiss the complaint against them is granted.

The complaint against the federal defendants is also dismissed, and the plaintiff's motions to reargue and for partial summary judgment are denied.

It is so ordered.

Dated: New York, New York
December 21, 1976.

MORRIS E. LASKER
U.S.D.J.

FOOTNOTES

1. The other basis on which plaintiff urged the court to reconsider its October 8, 1974 ruling is that the due process claim to access to the files was not moot since discovery of the files was necessary to prosecute the claim for damages. The government's voluntary disclosure of the full contents of Altimus' parole file to his counsel eliminates that as a basis of the motion to reargue.
2. In addition to the developments discussed in the earlier opinion, the Parole Commission Act of 1976, Pub. L. 94-233 (March 15, 1976) 18 U.S.C. §4206 et. seq. (1976 Supp.) has afforded virtually every right claimed by the plaintiff and not previously rejected by the appellate courts. Moreover, in light of the disposition of the federal defendants' motion to dismiss, the motion to reargue for purposes of obtaining a declaratory judgment in aid of the claim for damages is moot.
3. HFJ and its employee, Harold M. Stewart, named as defendants, have never appeared in this action, and appear to be in default.
4. It must be noted that plaintiff's statement of facts in ¶¶ 10-11 of his Affidavit in Support of the Motion for Partial Summary Judgment totally belies his claims in the second cause of action in the Amended Complaint, in which he claimed that the federal Bureau of Prisons defendants inadequately or negligently investigated the adequacy of his parole release plan.

LASKER, D.J.

Robert Altimus, a former prisoner in the Federal Correction Institution at Sandstone, Minnesota, moves for partial summary judgment pursuant to Federal Rules 56 and 57 for a declaratory judgment that defendants' actions in denying his application for parole violated his rights under the due process clause of the Fifth Amendment. In addition, he seeks a permanent injunction restraining the federal defendants from any further denial of the rights claimed. The defendants are Elliott Richardson, former Attorney General of the United States, Maurice H. Stigler, Chairman of the United States Board of Parole, several individual members of the United States Board of Parole, Norman A. Carlson, Director of the United States Bureau of Prisons, and Ralph L. Aaron, Warden of the Correction Facility at Sandstone.

Altimus was incarcerated at Sandstone following his conviction for interstate theft of an automobile. When eligible to apply for parole, he prepared a "parole-plan" which he submitted in proper form to support his application. On August 10, 1972, he received notice that he had been scheduled to appear before the United States Board of Parole Examiner's delegate at sessions commencing August 14, 1972. On that date, Altimus came before a representative of the Board and was given a

short, and allegedly inadequate explanation of parole application procedures. He then proceeded to present the reasons why he believed he was entitled to parole. After this hearing, by letter dated November 18, 1972, Altimus received a "notice of action" report which stated without explanation that he was "to continue to expiration" of his sentence.

Altimus alleges that he was not given a fair and impartial hearing because he received inadequate notice of the parole proceeding; he was denied an opportunity to examine or to rebut any adverse materials in his file; he was not provided with a statement of the reasons for denial of his application; and he was denied counsel. He contends that as to each of his claims, there is no issue of material fact and that his entitlement to relief is clear as a matter of law.

I.

We need not reach the merits of Altimus' claim for injunctive relief because we find that it is presently moot and that no case or controversy any longer exists. Subsequent to the commencement of this action, Altimus was released from prison on mandatory parole and is currently residing in Florida serving a period of probation. Furthermore, and of equal importance,

2.

the Parole Board has promulgated new regulations which are being adopted on a regional basis across the United States. Relevant to Altimus' interests, they became effective in the Northeast Region, October 1, 1973, (38 F.R. 26652), in the North Central Region, September 30, 1974 (39 F.R. 35165), and the Southeastern Region, September 3, 1974 (39 F.R. 31882). With one exception, these regulations furnish the relief Altimus has requested in terms of procedural safeguards at parole application hearings. For example, they require written notice of the time and place of the hearing to be given; informing the prisoner of the reasons for denial of parole; providing that prisoners be represented by persons of their choice to the limited extent of submitting information or making a statement at the conclusion of the hearing; and providing for appeals from the Board's decision. Moreover, the Court of Appeals for the Second Circuit has determined that the New York State Parole Board must furnish a prisoner with a statement of reasons for denying his parole application in order to satisfy the demands of due process. United States ex rel. Johnson v. Chairman of the New York State Board of Parole, slip op. No. 73-2581, June 13, 1974. Although this decision sets out the minimal

due process consistent with the United States Constitution which must be afforded a State parole-applicant, we find no difficulty in applying the same criteria to a federal parole-applicant in view of the Second Circuit's reliance on King v. United States, ____ F.2d ____ (7th Cir. Mar. 13, 1974) and United States ex rel. Harrison v. Pace, 357 F.Supp. 354 (E.D. Pa. 1973).

The only claim raised by Altimus which is not resolved in the new regulations concerns his right to review his file during the parole hearing. Although we have indicated above that this issue is moot, we take notice of it only to suggest that it may present a novel question of law. See Childs v. United States Board of Parole, ____ F. Supp. ____, 14 Crim. L. Rptr. 2135 (D.D.C. Oct. 15, 1973). Contra, 38 F.R. 26652 §2.50 and 28 C.F.R. §2.48.

II.

A "case or controversy" capable of judicial determination must satisfy the criteria set forth in Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 (1937).

"It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."

The controversy at hand has been resolved by the passage of time and has made impossible the granting of any relief which will alter plaintiff's status. The request for a permanent injunction must be denied since the Parole Board's procedures no longer deny plaintiff the rights he claims as he is now enjoying mandatory parole. The promulgation of new regulations intended to insure due process safeguards to parole applicants renders injunctive relief inappropriate, since an injunction would provide no assurances of procedural safeguards greater than those already mandated by the regulations. See SEC v. Culpepper, 270 F.2d 241 (2d Cir. 1959); Williams v. U.S. Dept. of Justice, Bureau of Prisons, 462 F.2d 1291 (5th Cir. 1972); Van Erman v. Schmidt, 343 F. Supp. 377 (D.C. Wis. 1972). Moreover, as Altimus himself suggests, it may well be that no need will arise for him to make further parole application; and, in any event, should this assumption prove false, he will presumably be protected by the requirements of the new regulations.

III.

Altimus' request for a declaratory judgment also fails to present a case or controversy to authorize judicial action. Maryland Casualty Co. v. Pacific Coal

and Oil Co., 312 U.S. 270, 273 (1941) reiterates the criteria set out in Haworth, supra, as applied to the Declaratory Judgment Act.

"Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."

At best, the granting of declaratory relief would entitle Altimus to a new hearing on his parole application. Since he is on parole, this relief would be fruitless. His reliance on Super Tire Engineering Co. v. McCorkle, 41 U.S.L.W. 4507 (U.S. April 16, 1974) is misplaced. In that case, the Supreme Court held that declaratory relief was proper, but emphasized that

"... the challenged governmental activity ... is not contingent, has not evaporated or disappeared and by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of petitioning parts." Id. at 4509.

The circumstances here are the reverse, for the controversy has indeed "evaporated or disappeared" with the adoption of the new regulations governing parole hearings and the Second Circuit ruling mandating that a written statement of reasons for denial of parole be given to

the prisoner-applicant. Moreover, unlike the plaintiffs in Super Tire, supra, Altimus cannot "show the existence of an immediate and definite governmental action or policy that ... continues to affect a present interest," or, more broadly, a case which affects "the behavior of citizens in our society." Supra at 4510. No current or continuing and fixed policy of the Parole Board poses any imminent threat to Altimus or others, at this point in time.

This fact critically distinguishes plaintiff's case from the decisions on which he relies. In those cases, the moving parties were incarcerated from the commencement of the action until judgment. See, e.g., Harrison v. Pace, 357 F.Supp. 354 (E.D. Pa. 1973); Childs v. United States Board of Parole, ____ F.Supp. ____, 14 Crim. L. Rptr. 2135 (D.D.C. October 15, 1973); Johnson v. Giggie, 362 F.Supp. 851 (D. Cal. 1973). Johnson, supra, is precisely in point. There the court dismissed as moot a civil rights action by State prisoners who sought an order compelling the Board to disclose the reasons for denial of their parole applications because the State Board of Parole had established regulations providing that parole applicants be given written reports of the reasons for denial of their requests.

IV

In his reply memorandum plaintiff for the first time puts before us the question of damages, apparently for the purpose of refuting the defendants' claims that the issues of the case have become moot. Understandably the plaintiff does not move for summary judgment as to damages which clearly would involve factual issues that cannot be determined except at trial. Nothing we have said in this opinion is intended to indicate that plaintiff's claim for damages is moot.

The motion for partial summary judgment for injunction and declaratory relief is denied.

It is so ordered.

Dated: New York, New York
October 7th, 1974.

MORRIS E. LASPER
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
ROBERT WILLIAM ALTIMUS

Plaintiff,

vs.

MANHOOD FOUNDATION, INC., et al.,

Defendants.
-----x

UNITED STATES DISTRICT
COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK.

Case No. 73 Civ. 599

JUDGE Lasker

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROBERT WILLIAM ALTIMUS,
Plaintiff,

vs.

MANHOOD FOUNDATION, INC., et al.,
Defendants.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
NEW YORK.

CASE NO. 73 Civ. 599

JUDGE Lasker

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